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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 950

RUSSELL HAMLETT,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Russell Hamlett, prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on September 15, 1969.

Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division, is unreported and is printed in Appendix (1a) hereto, *infra*. The order denying certification by the Supreme Court of New Jersey is appended hereto, *infra*, at page 6a.

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on June 10, 1969, page 1a, *infra*. The order denying petition for certification by the Supreme Court of New Jersey is dated September 15, 1969, page 6a, *infra*. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257 (3).

Question Presented

Was the trial court's refusal to permit testimony by one charged with the same crime as petitioner, but not named in the indictment and not on trial, based upon the witness' mere assertion of privilege of self-incrimination, violative of the petitioner's Sixth Amendment right to have compulsory process for obtaining witnesses in his behalf?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION—Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for defense."

UNITED STATES CONSTITUTION—Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Statement of the Case

Defendant was convicted of the crime of unlawful possession of narcotics drug (heroin) in the Essex County Court, New Jersey, in violation of New Jersey Statute N.J.S.A. 24:18-4 and sentenced to New Jersey State Prison for a term of 5 to 7 years. He appealed to the Superior Court of New Jersey, App. Div., an intermediate appellate court, where his conviction was affirmed. Opinion of the Court is appended hereto. (Page 1a, *infra.*)

Under New Jersey practice there is no right to appeal to the highest tribunal of that State, the Supreme Court of New Jersey, except in limited circumstances. Pursuant to the procedure and rules of the New Jersey Supreme Court, the petitioner filed a petition for certification seeking leave to appeal to the New Jersey Supreme Court, which was denied by order of that Court dated September 15, 1969.

The States' evidence was that on January 23, 1968, two police officers, while cruising in an unmarked car, observed Albert Smallwood standing on Pershine Avenue, Newark, New Jersey, leaning into an open window of petitioner's parked car. As the police approached Smallwood, he snatched his hand from inside the car and a glassine packet of heroin fell to the ground. Under orders by the police, petitioner got out of his automobile and the police found money and another packet of heroin on the floor of the car. The police then arraigned petitioner, Smallwood, and Lewis, who was seated in petitioner's car.

Petitioner denied he committed the crime charged and disclaimed all knowledge of the heroin found in his car. He claimed the money seized by the police belonged to Maurice Lewis, a passenger who placed it on the dashboard. When the police arrived, petitioner was talking to a man named Harvey, who was standing next to his car; that Harvey and Smallwood, who had been standing nearby, then started to walk away, but were halted by the police.

When the petitioner concluded his testimony the court was informed, out of the presence of the jury, that he intended to call Smallwod as a witness. Smallwood also had been indicted for possession of narcotics and was then awaiting trial. Smallwood's attorney advised the court that his client refused to testify on the grounds of self-incrimination. Based upon that representation, the court excused Smallwood from testifying and directed that the jury not be informed of the reason for Smallwood's failure to testify. This issue was raised before the Superior Court of New Jersey, Appellate Division, and in the petition for certification to the Supreme Court of New Jersey.

Reasons for Granting the Writ

1. In *Washington* v. *Texas,* 388 U. S. 14 (1967), the Court held that an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was so fundamental that it could be considered incorporated in the due process clause of the Fourteenth Amendment so as to be applicable in a state trial.

The Court further held that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the state arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony

would have been relevant and material to the defense. Following this holding, the Court in footnote 21 of the opinion said "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self incrimination or the lawyer-client, or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualification for interest. * * *"

Since the decision in *Washington* v. *Texas, supra,* a conflict in interpretation has arisen between the various courts in applying the principles enunciated therein particularly in those cases where a witness charged with the same crime, but not named in the indictment and not on trial, refuses to be sworn and take the stand when called by the defendant, urges the constitutional privilege against self-incrimination. The New York Court of Appeals in *People* v. *Owens,* 22 N. Y. (2d) 93, 238 N. E. (2d) 715, 718 (1968) recognized the issue to be one of constitutional dimensions when it said, "* * * Important too, however, is the undoubted statutory, and perhaps even constitutional, right of a defendant to call as a witness an alleged accomplice whether or not under indictment, a right unqualified unless arising in a joint trial and the prospective witness co-defendant objects (Code Crim. Pro. 393-a; *People* v. *Wells,* 272 N. Y. 215, 5 N. E. (2d) 206; *People* v. *O'Regan,* 221 App. Div. 331, 333, 223 N. Y. S. 339, 342; see *Washington* v. *Texas,* 388 U. S. 14, esp. N. 21, 87 S. Ct. 1920).

Also see *Jenkins* v. *McKeithen,* 395 U. S. 411 at 429 (1969) where the Court said

> "* * * The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. See e.g. Morgan v. United States,

304 U. S. 1, 18 (1938); Baltimore & Ohio R.R. Co. v. United States, 298 U. S. 349, 368-369 (1936). And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime. Cf. Washington v. Texas, 388 U. S. 14." • • •

In *Myers* v. *Frye,* 401 Fed. 2d 18 (7th Cir. 1969) defendant claimed his Sixth Amendment rights were violated when the Court refused to allow defendant to call an accomplice to testify since her lawyer advised the prosecutor that the accomplice would refuse to testify on the Fifth Amendment grounds. Defendant argued that this ruling violated his right to compulsory process under the Sixth Amendment as enunciated in *Washington* v. *Texas, supra.* The Circuit Court held that denying the criminal defendant the right to call a witness who has indicated that she will refuse to testify on grounds of self-incrimination does not fall within the class of rules condemned in *Washington* v. *Texas.* The Circuit Court reasoned that the Sixth Amendment does not operate to prevent a state from adopting any limitations on defense evidence in criminal trials, but only prevents the adoption of broad arbitrary limitations. The limitations presented were neither broad nor arbitrary, and consequently found no violation of defendant's Sixth Amendment rights. Also see *Zerchausky* v. *Beto,* 396 Fed. 2d 356 (5th Cir. 1968).

Contrary to the holding in *Myers* v. *Frye* and *Zerchausky* v. *Beto, supra,* the New York Court of Appeals in *People* v. *Owens,* 22 N. Y. 2d 93, 238 N. E. (2d) 715, 718 (1968) held that a defendant has a right to call as a witness an alleged accomplice whether or not under indict-

ment, unless prospective witnesses as a co-defendant in a joint trial objects. In its holding the New York Court of Appeals mentions footnote 21 of *Washington* v. *Texas, supra.*

Here, the witness, Smallwood, was not a co-defendant; he was under indictment for a similar crime arising out of the same transaction. The trial court barred his testimony merely on his claim of self-incrimination. In *United States* v. *Carella,* 411 Fed. 2d 729 (2nd Cir. 1969) it was held that a defendant is entitled to the testimony of a co-defendant unless a co-defendant blocks the road with a justified claim of privilege.

Protection is given a witness to achieve the basic policy against compulsory self-condemnation. But it has other implications, for manifestly it affects the interests of litigants who are denied the benefit of the facts the witness conceals under his personal privilege. Hence, two values are involved: (1) the right of litigants to a decision upon the whole truth; and (2) the right of a witness to refuse to condemn himself by his own lips. Unlike a defendant to a criminal charge, a witness must take the stand. He must testify up to the point where an answer will tend to incriminate. Moreover at a trial concerning others, the need for justice to the litigants understandably tends to loom above the seemingly more remote value, the privilege of a witness.

2. The decision of the Superior Court of New Jersey, Appellate Division is believed to be erroneous and in conflict with the decisions of this Court and other State courts. A witness may not make himself the final judge of the availability of the Fifth Amendment privilege against self-incrimination. He must make a sufficient showing to permit the court to pass upon it. *Malloy* v.

Hogan, 371 U. S. 1, 11-12 (1964); *Hoffman* v. *United States,* 341 U. S. 479, 486-487 (1951). The trial judge is not to accept the witness' mere statement that the answer will tend to incriminate him. It is for the court to see whether his silence is justified.

The courts of several states have had occasion to pass on the question whether one jointly charged with another or charged with the same crime as another, can be compelled to take the witness stand when he himself is not on trial, and urges the constitutional principle against self-incrimination. They have held that such constitutional guaranty is no justification for his refusal to be sworn and to take the witness stand, because he can claim his privilege when he has been asked the question the answer to which would tend to incriminate him. See *State* v. *Addington,* 195 Kan. 276, 147 P. 2d, 367 (1944); *State* v. *Hall,* 59 S. D. 98, 238 N. W. 302 (1931); *State* v. *Nelson,* 91 Vt. 168, 99 Atl. 881 (1917); *Ex Parte Stice,* 70 Cal. 51, 11 P. 459 (1886).

In this case the trial court refused to permit Smallwood to take the stand to be sworn and answer any questions merely upon his claim of self-incrimination. Objection was made to the court. The Superior Court, Appellate Division, recognized that petitioner was denied the right to call Smallwood as a witness and also noted that the court should have directed that Smallwood be called to the stand and be sworn in the absence of the jury and that petitioner should have been permitted to question him. In that manner, the court could have passed on the materiality and propriety of the questions asked and the witness' justification in his refusal to answer.

The New Jersey Superior Court, Appellate Division, ruled that no prejudice had been demonstrated by the

petitioner because of the refusal of the witness Smallwood to take the stand based upon his claim of self-incrimination. This ruling is in conflict with decisions in other jurisdictions. In *People* v. *Wells,* 272 N. Y. 215, 5 N. E. 2d 206, the New York Court of Appeals held that the trial court's refusal to require the sheriff to produce deceased's wife as a witness for the defendant because of anticipated objection of counsel of wife, also charged with murder, that her testimony would incriminate her, was reversible error. The refusal to swear as a witness one charged with the same crime as a defendant, but not named in the indictment, held prejudicial error, notwithstanding assertion of privilege against self-incrimination. *State* v. *Hall,* 59 S. D. 98, 238 N. W. 302 (1931).

The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that have been held applicable to the States. *Washington* v. *Texas, supra.* Where there has been a denial of such right, prejudice to the accused is presumed. *Brookhardt* v. *Janis,* 384 U. S. 1 (1966). Before a federal constitutional error can be held harmless, "the Court must be able to declare a belief that it was harmless beyond a reasonable doubt". *Chapman* v. *California,* 386 U. S. 18 (1967).

A review of the record will show that Smallwood's testimony was vital to the defense. The State contended that there were only three persons arrested at the time the incident occurred, which brought about the indictment of the petitioners, namely, Albert Smallwood, Maurice Lewis and defendant, Russell Hamlett. It was also the State's contention that Albert Smallwood was standing next to the petitioner's car when the police approached it (R. 20a-21a) and something floated to the

ground. The petitioner contended that there were four persons arrested at the time, namely, Maurice Lewis, Albert Smallwood, a man known as Harvey and himself, and that at the time the police approached the car, Harvey was standing next to it and Smallwood was across the street (R. 56a and 57a). It thus can be seen that the corroborating testimony of Albert Smallwood was essential to the defense, especially where a factual issue was in sharp conflict.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND A. BROWN,
Counsel for Petitioner.

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

Argued May 26, 1969. Decided June 10, 1969.

Before Judges Caulkin, Collester and Labrecque.

On appeal from the Essex County Court, Law Division.

MR. GEORGE R. SOMMER argued the cause for appellant.

MR. DONALD S. COBURN, Assistant Prosecutor, argued the cause for respondent (MR. JOSEPH P. LORDI, County Prosecutor, attorney).

The opinion of the court was delivered by
COLLESTER, J. A. D.

Defendant appeals from his conviction of unlawful possession of a narcotic drug (heroin) in violation of N.J.S.A. 24:18-4.

The State's evidence was that police officers, while cruising in an unmarked car, observed Albert Smallwood standing on the street, leaning into the open window of defendant's parked car. As the police approached Smallwood snatched his hand from inside the car and a glassine packet of heroin fell to the ground. After the defendant got out of his automobile the police found another packet of heroin and some money on the floor of the car. Smallwood told the officers he was "getting ready to make a buy" from Hamlett.

Defendant denied that he committed the crime charged and disclaimed all knowledge of the heroin found in his

car. He said the money seized by the police belonged to Maurice Lewis, a passenger, who had placed it on the dashboard. He testified that when the police arrived he was talking to a man named Harvey who was standing next to his car; that Harvey and Smallwood, who had been standing nearby, then started to walk away but were halted by the police.

When the defendant concluded his testimony the court was informed, out of the presence of the jury, that he intended to call Smallwood as a witness. Smallwood had also been indicted for possession of narcotics and was then awaiting trial. His attorney advised the court that his client refused to testify on the grounds of self-incrimination. Based upon that representation, the court excused Smallwood from testifying and directed that the jury not be informed of the reason for Smallwood's failure to testify.

Defendant's sole ground of appeal is that he was denied a fair trial by the court's ruling. He contends that Smallwood should have been required to take the stand and be sworn in the presence of the jury before he was excused from testifying; that questions could have been asked which would not have incriminated him and might have been beneficial to the defendant and corroborative of his testimony. He further argues that if Smallwood's refusal to answer questions was sustained by the court, the defendant would have had a right to comment thereon in his summation to the jury.

Smallwood had been indicted for possession of narcotics arising out of the same set of circumstances upon which the defendant's indictment was based. The court

concluded on the basis of the evidence presented that any interrogation of Smallwood as to his participation in or knowledge of the incident leading to the defendant's indictment would impinge on his constitutional right against self-incrimination. A witness cannot be compelled to answer any question where the answer would tend to incriminate him. However, the trial judge should not accept the witness' mere statement that his answers will tend to incriminate him. He must evaluate the hazard to the witness and determine whether his refusal to answer is justified. *State* v. *De Cole*, 33 N. J. 335, 341, 350 (1960).

We think the procedure which should have been followed in this case is that set forth in *State* v. *Fournier*, 91 N. J. Super. 477, 480-81 (App. Div. 1966). When Smallwood indicated that he would refuse to testify in reliance upon his Fifth Amendment privilege against self-incrimination, the court should have directed that he be called to the stand and be sworn in the absence of the jury and the defendant should have been permitted to question him. In that manner the court could have passed upon the materiality and propriety of the questions asked and the witness' justification for his refusal to answer.

However, the defendant made no proffer to the court of what Smallwood's testimony would have been if he had taken the stand. The oath of the witness would have added nothing to the information which the court possessed as to the risk of self-incrimination to which Smallwood would have been exposed. In the absence of any showing of prejudice we see no reason which would justify a reversal because of the procedure followed by the

court in this case. See *Midgett* v. *State*, 223 Md. 282, 164 A. 2d 526, 530-31 (Ct. App. 1960).

Nor do we find any error in the court's direction that no comment should be made to the jury regarding Smallwood's reason for failing to testify. Smallwood's reliance upon his constitutional privilege against self-incrimination should not be made the basis of any inference to be drawn by the jury, either favorable to the prosecution or favorable to the defendant. See Annotation, "Witness Claiming Privilege—Inferences," 24 A.L.R. 2d 895-96 (1952).

Affirmed.

APPENDIX B

Judgment and Mandate on Affirmance

It is hereupon ordered and adjudged that the Judgment of the said Essex County Court—Law Division is affirmed with costs and that the record be remitted to the Essex County Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.

Judgment Entered: June 10, 1969

Mandate Issued: September 25, 1969

MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

APPENDIX C

Order of the Supreme Court of New Jersey, Denying Petition for Certification

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 15th day of September, 1969.

A TRUE COPY

JOHN H. GILDEA,
Clerk of the Supreme Court.

Filed September 16, 1969

JOHN H. GILDEA,
Clerk.